K Muthulagu v Lembaga Pelabuhan Klang

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–159–90
JAMES FOONG J
14 AUGUST 1995

Civil Procedure *— Writ of summons — Indorsement to show representative capacity — Whether non-endorsement fatal — Whether mere irregularity which could be cured — Failure to apply to set aside within reasonable time — Rules of the High Court O 2 rr 1(2), 2(1) & O 6 r 3(1)(e)*

Civil Procedure *— Parties — Representative action — Fluctuating members — Whether proceedings nullified — Whether sufficient for class to be defined*

Labour Law *— Pensions — Calculation — Statutory body — Claimant employed by private company — Company subsequently became subsidiary of statutory body — Whether period of employment continues from subsidiary company to statutory body for purpose of calculating pension — Definition of employee — Statutory and Local Authorities Pension Act 1980 s 2*

The plaintiff brought this action on his own behalf and in a representative capacity on behalf of 91 other employees of the defendants. The plaintiff joined Cargo Handling Corp ('the CHC'), a private limited company, as an employee on 30 December 1953. In 1963, by virtue of the Port Authorities Act 1963, the defendants were created as a statutory body and became owners of 98% of the shares issued by CHC. The defendants absorbed almost all the staff of CHC as their employees. The date when most of the employees, including the plaintiff, were engaged by the defendants was recorded as 1 May 1973. Upon leaving the employment of CHC, the plaintiff received gratuity payments from them. The plaintiff retired from the defendants on 15 September 1985. By virtue of the Statutory and Local Authorities Pension Act 1980 ('the Act'), the plaintiff was given gratuity and pension computed from 1 May 1973, the date he was accepted into the defendants' employment. The plaintiff claimed that the date of such computation should begin from the time they joined CHC and not 1 May 1973 as CHC was at all material times a subsidiary of the defendants, and there was no break in the plaintiff's service of employment from CHC to the defendants. The defendants on the other hand argued that they are a statutory body and are bound by the method of payments of gratuity and pension as set out in the Act. The defendants, inter alia, raised the following issues: (i) the failure to endorse the plaintiff's representative capacity in the writ in accordance with O 6 r 3(1)(e) of the Rules of the High Court 1980 ('the RHC') was fatal; and (ii) some of the persons represented by the plaintiff were dead.

Held, dismissing the plaintiff's application:

(1) The non-endorsement in the writ was not fatal so as to nullify the proceedings. It was a mere irregularity and could be accepted under O 2 r 1(2) of the RHC. Furthermore, the application to set aside the proceedings based on this irregularity was only made after the parties had closed their cases, and was thus not made within a reasonable time as stipulated in O 2 r 2(1) RHC.

(3) The fact that some of the persons whom the plaintiff represents were dead did not nullify the proceedings, for the plaintiff was still alive and could still continue to represent those who were alive. The main qualification for such action is that the parties must constitute a defined class, though it is immaterial that it is fluctuating.

(3) The plaintiff's employment with CHC was duly terminated before he entered into the service of the defendants on 1 May 1973. There was no implication that the plaintiff's employment continued from CHC to the defendants. With the defendants being a separate entity from CHC, computation of gratuity and pension could only be based on the time when the plaintiff entered into employment with the defendants, which was on 1 May 1973. The Act clearly specifies that it is only applicable to an 'employee' under the Act which is defined in s 2 as a person on full time employment with a statutory body or local authority. The plaintiff was not such an employee before 1 May 1973, and therefore did not qualify to have his claim for pension calculated beyond 1 May 1973.

[Bahasa Malaysia summary

Plaintif telah membawa tindakan ini bagi pihaknya sendiri dan dalam keupayaan perwakilan bagi pihak 91 orang pekerja lain defendan. Plaintif telah mula berkhidmat dengan Cargo Handling Corp ('CHC'), iaitu suatu syarikat sendirian berhad, sebagai seorang pekerja pada 30 Disember 1953. Pada tahun 1963, dengan adanya Akta Lembaga Pelabuhan 1963, defendan telah ditubuhkan sebagai sebuah badan berkanun dan menjadi pemilik 98% saham yang dikeluarkan oleh CHC. Defendan telah mengambil hampir kesemua kakitangan CHC sebagai kakitangan mereka. Tarikh bila kebanyakan daripada pekerja itu, termasuk plaintif, telah digaji oleh defendan dicatatkan sebagai 1 Mei 1973. Apabila meninggalkan pekerjaan di CHC, plaintif telah menerima wang ganjaran daripada mereka. Plaintif telah bersara daripada perkhidmatan defendan pada 15 September 1985. Mengikut Akta Pencen Pihak-Pihak Berkuasa Berkanun dan Tempatan 1980 ('Akta itu'), plaintif telah diberi ganjaran dan pencen yang dikira bermula dari 1 Mei 1973, iaitu hari yang beliau diterima sebagai kakitangan defendan. Plaintif mendakwa bahawa tarikh pengiraan sepatutnya bermula dari hari mereka mula bekerja di CHC dan bukannya pada 1 Mei 1973 kerana pada semua masa yang berkenaan

A CHC adalah anak syarikat defendan, dan khidmat plaintif dari CHC ke defendan tidak terputus. Defendan sebaliknya berhujah bahawa mereka adalah sebuah badan berkanun dan adalah terikat oleh cara pembayaran ganjaran dan pencen seperti yang ditetapkan di dalam Akta itu. Defendan, antara lainnya, telah menimbulkan isu-isu berikut:
B (i) kegagalan untuk mengendors keupayaan perwakilan plaintif di atas writ menurut A 6 k 3(1)(e) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') membawa padah; dan (ii) beberapa daripada mereka yang diwakili oleh plaintif telahpun meninggal dunia.

Diputuskan, menolak permohonan plaintif:

C (1) Kegagalan untuk mengendors writ itu tidak membawa padah untuk mengakibatkan prosiding itu dibatalkan. Ia semata-matanya suatu luar aturan dan boleh diterima di bawah A 2 k 1(2) KMT. Lagipun, permohonan untuk mengenepikan prosiding ini berdasarkan luar aturan ini hanya dibuat selepas pihak-pihak
D telah menutup kes mereka, dan dengan demikian tidak dibuat dalam masa yang munasabah seperti yang ditetapkan oleh A 2 k 2(1) KMT.

(2) Hakikat bahawa beberapa orang yang diwakili oleh plaintif telahpun meninggal dunia tidak membatalkan prosiding kerana
E plaintif masih hidup dan boleh terus mewakili mereka yang masih hidup. Kelayakan yang paling penting untuk suatu tindakan sedemikian ialah supaya pihak-pihak berkenaan mesti merupakan satu kelas yang tetap, walaupun bilangan ahlinya sentiasa bertukar.

(3) Pekerjaan plaintif dengan CHC telah ditamatkan sebelum plaintif
F mula bekerja dengan defendan pada 1 Mei 1973. Tidak terdapat implikasi bahawa penggajian plaintif bersambung dari CHC ke defendan. Dengan terbuktinya bahawa defendan adalah entiti yang berasingan daripada CHC, pengiraan ganjaran dan pencen hanya boleh bermula dari masa plaintif menjadi pekerja defendan iaitu pada 1 Mei 1973. Akta itu dengan jelasnya menyatakan
G bahawa ia hanyalah boleh terpakai kepada seorang 'pekerja' yang ditakrifkan di dalam s 2 sebagai seseorang yang bekerja sepenuh masa dengan sesuatu badan berkanun atau pihak berkuasa tempatan. Plaintif bukanlah pekerja sebelum 1 Mei 1973, dan oleh itu tidak layak untuk menuntut manfaat pencen yang dikira
H dari masa sebelum 1 Mei 1973.]

[*Editorial Note*: The plaintiff in his representative capacity has appealed to the Court of Appeal.]

Notes

I For cases on writ of summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3657–3724.

For cases on parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2362–2498.

For cases on pensions, see 8 *Mallal's Digest* (4th Ed) paras 759–762, [1991] Mallal's Digest 1290–1292.

Cases referred to

Bowler v John Mowlem & Co Ltd [1954] 3 All ER 557; [1954] 1 WLR 1445 (distd)
Duke of Bedford v Ellis [1901] AC 1 (folld)
Loh Koon Moy & Anor v Zaibun Sa bte Syed Ahmad [1978] 2 MLJ 29 (folld)

Legislation referred to

Companies Act 1965
Port Authorities Act 1963
Statutory and Local Authorities Pensions Act 1980 s 2
Rules of High Court 1980 O 2 rr 1(2), 2(1), O 6 r 3(1)(e)

G Proctor (*YS Woo & Proctor*) for the plaintiff.
Jyotsana Doshi (*Abdullah & Zainuddin*) for the defendant.

James Foong J: The plaintiff is bringing a representative action on behalf of himself and 91 others whose names are as annexed to the statement of claim against the defendants for the following orders:

(1) a declaration that Cargo Handling Corp ('the CHC') was a wholly owned subsidiary of the defendants;

(2) a declaration that the defendants have breached the terms of the agreement in refusing to take into consideration the plaintiffs' services with CHC as a continuous service for purposes of computing gratuity and pension;

(3) a declaration that the defendants are obliged in law to adhere to the principles of industrial law as enumerated and practised in Malaysia;

(4) a declaration to the effect that for all material purposes, CHC was a statutory body;

(5) an order that the defendants do pay gratuity and pension computed from the date when the plaintiff joined the service of CHC;

(6) damages;

(7) interest; and

(8) costs.

The substantial facts of this case are not disputed and they are as follows. CHC is or was a private limited company incorporated in this country in 1953. One of its main objectives was to supply tally clerks, labourers and stevedores to Port Klang which was then known as Port Swettenham. Its main shareholders were then Malayan Railway, which were the operators of Port Swettenham. In 1963, by virtue of the Port Authorities Act 1963, the defendants were created as a statutory body, with one of its purposes

being to take over from Malayan Railway the operations of Port Swettenham. By this exercise the defendants became owners of 98% of the shares issued by CHC. The other 2% issued shares were held by nominee shareholders who were either a board member of the defendants or a staff employee of the defendants.

The plaintiff personally joined CHC as an employee on 30 December 1953. In the early part of 1973, the defendants decided not to issue a licence to CHC for the supply of tally clerks, labourers and stevedores for the defendants' operation in Port Swettenham. The name of this port was by then changed to Port Klang. They wished to employ their own staff to run this operation. In order to do so, they absorbed almost all the staff of CHC to be their employees. The procedure adopted was for the employees of CHC to apply for jobs in the defendants. The defendants would then offer positions to the successful applicants after satisfactory medical examinations on the candidates. These new employees of the defendants were then given circulars informing them that they were bound by certain directions governing statutory bodies. One of these relates to gratuity and pension benefits upon retirement. The 1 May 1973 was recorded as the date when most of these employees were engaged by the defendants; this included the plaintiff. After the plaintiff had left the employment of CHC, he received a certain sum of money as gratuity payments from CHC.

The plaintiff personally retired from the defendants on 15 September 1985 upon attaining the age of 55 years. By virtue of the Statutory and Local Authorities Pension Act 1980 ('the S & L Pension Act'), the plaintiff having completed not less than ten years of reckonable service and being a confirmed employee of the defendants, was given gratuity and pension computed from 1 May 1973, the date he was accepted into the defendants' employment. This is where the dispute arouse. The plaintiff and those of in his class action claim that the date of such computation should begin from the time they joined CHC and should not be based on 1 May 1973. This is for reason that CHC was at all material time a subsidiary of the defendants, and there was no break in the plaintiff's service of employment from CHC into the defendants.

The defendants on the other hand argued, inter alia, that they are a statutory body, and as such, are bound by the mode or method of payments of gratuity and pension as set out in the S & L Pension Act. They also claimed that the plaintiff and those of his class only entered into their employment on 1 May 1973.

In the written submission of the defendants, some preliminary issues were raised relating to non-compliance of the Rules of the High Court 1980 ('the RHC') by the plaintiff, and to the entitlement of the plaintiff to qualify in bringing a representative action.

The first objection of the defendants is that of the non-endorsement in the writ to state that the plaintiff is suing in a representative capacity in accordance with O 6 r 3(1)(e) of the RHC. In support of this contention, the defendants' counsel quoted para 6/3 at p 47 of 1 *Supreme Court Practice*

1991 ('the White Book'), which states that it is 'the endorsement on the writ that is (the) crucial matter and not the statement in the title which is a mere description'. Thus failure to endorse on the writ should nullify the writ even though there is a description of representative capacity after the name of the plaintiff. A

The defendants' counsel though acknowledging this omission submitted that such an oversight is not fatal, since proper description of the plaintiff's representative capacity is also described in the statement of claim besides appearing on the title. B

A careful perusal of the quoted passage in the White Book reveals the supporting authority of *Bowler v John Mowlem & Co Ltd* [1954] 3 All ER 557; [1954] 1 WLR 1445. In that case, the widow of the deceased who died as a result of an industrial accident issued a writ against the defendants with the title, 'Between Winifred Bowler (administratrix of Thomas Henry Bowler deceased)'. There was no endorsement of the plaintiff's representative capacity in the writ nor was this found in the statement of claim. The Court of Appeal ruled against the plaintiff, but the main reason for this decision was that the plaintiff at the date of the issue of the writ was not the administratrix of the deceased's estate as described, since the grant of letters of administration had not been granted to her when the writ was issued. She had therefore no legal capacity to fit the description. However, in our present case the plaintiff personally and those he represent are in full legal capacity to bring an action against the defendants. They share a common interest, a common grievance and a common remedy that is beneficial to all. The non-endorsement on the writ, in the opinion of this court, ought not be fatal as to nullify the proceeding. It is only an irregularity, and can be accepted under O 2 r 1(2) of the RHC, similar to that as expressed in the judgment of Chang Min Tat SCJ in *Loh Koon Moy & Anor v Zaibun Sa bte Syed Ahmad* [1978] 2 MLJ 29, where the circumstances are virtually similar. Further, it would be pertinent to point out that O 2 r 2(1) of the RHC requires application to set aside any proceedings based on irregularity to be made within a reasonable time. In this instance, this objection was only raised in the submission of the defendants when testimonies from both the plaintiff's and the defendants' witnesses had been taken, and parties had closed their case. This, certainly is very late in the day to raise such a matter. C D E F G

The second objection of the defendants relates to some of the persons whom the plaintiff represents not being emplaced on the pensionable scheme under the S & L Pension Act. As stated earlier, in order to qualify for pension under this Act, the person must have completed ten years of reckonable service (which has been subsequently changed to three years by a 1992 Amendment Act), and being confirmed in his appointment. Whether one qualifies within the ten years of reckonable service must obviously depend on when calculation begins. The defendants alleged that some of these persons whom the plaintiff represents have not fulfilled the period of reckonable service based on the time commencing from 1 May 1973. This, however puzzles this court because the very issue of this case is based on this date of calculation, in which the plaintiff alleged should be extended H I

A before this date to the time he was with CHC. If this court should rule that such a proposition is the correct position in law, then all these objected persons may be emplaced persons under the pensionable scheme. For this reason, this court is of the view that this objection is premature.

The third objection of the defendants is that some of the persons B whom the plaintiff represents are dead. Such occurrence should not nullify this proceedings, for the plaintiff is still alive and he can still continue to represent those who are alive. As set out by Lord Macnaghten in *Duke of Bedford v Ellis* [1901] AC 1, the classic case on representative's actions, the main qualification for such action is that the parties must constitute a defined class, though it is immaterial that it is fluctuating.

C Returning to the main issue, the plaintiff's counsel has strenuously requested this court to lift the corporate veil of CHC, in order to determine who were the alter ego of this company. From the evidence tendered, there is no necessity for such a move. Full particulars of CHC have already been revealed, and the defendants have never denied that they did own 98% of D her shareholdings, with the balance held by a member of the defendants or a staff under their employment. But does this make the plaintiff and all those he represents employees of the defendants during their time of service with CHC? The answer is in the negative, for CHC is and was a separate entity from that of the defendants. CHC is or was incorporated under the Companies Ordinance, a predecessor of the present day E Companies Act 1965, and it functioned and operated through its board of directors and employed staff. Though some of these directors were also members or employees of the defendants, one cannot escape from the legal distinction that CHC stands distinctly on its own as a legal entity. Similarly, this applies to the defendants who are a creation of statute. F Being a separate entity, any person who was engaged by CHC must have been an employee of CHC and not otherwise. He could not have been an employee of the defendants for the defendants have never engaged him. All the defendants have with CHC was ownership of shares in this company, and as shareholders, they derived income from CHC through share dividends of CHC. They may also have some common directors with G CHC, but this does not mean that under law both these bodies are the same.

The plaintiff has confirmed that he was an employee of CHC, and from evidence tendered, his salary was paid by CHC. On 2 April 1973, CHC informed the plaintiff of his termination of service — exh D30. H There was then an offer by the defendants for employment with the defendants — exh P12. In response, the plaintiff applied for a position as shown in exh P13. This was followed by a medical examination of the plaintiff as can be seen through exhs P14 and P15. The plaintiff was then confirmed in employment with the defendants by way of a letter dated 26 April 1973 — exh P16. The plaintiff then agreed to comply with the I defendants' service regulations — exh P22. To complete this picture, the plaintiff also received and accepted from CHC retirement gratuity amounting to RM4,174.59 — exh P17. All these lead to only one conclusion, and that is, the plaintiff's employment with CHC was duly

terminated before he entered into the service of the defendants on 1 May 1975. There can be no implication that the plaintiff's employment continued from CHC to the defendants. With the defendants being a separate entity from CHC, computation of gratuity and pension can only be based on the time when the plaintiff entered into employment with the defendants, and from the evidence, this clearly indicates 1 May 1973.

The S & L Pension Act clearly specified that it is only applicable to an 'employee' under this Act. 'Employee' under s 2 of this Act means a person on full time employment with a statutory body or local authority. The plaintiff was not such an employee before 1 May 1973, and as such does not qualify to have his claim for pension calculated beyond 1 May 1973. To declare otherwise as prayed for by the plaintiffs under prayer (5) would be tantamount to not only going against the law, but to make laws which are strictly not within the framework of the judiciary; this area should be best left to the legislature.

Accordingly, this court hereby dismisses prayers (1), (2), (3), (4), (5), (6), (7) and (8) of the plaintiffs' claim with cost to be awarded to the defendants.

Application dismissed.

Reported by Azra Azman